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TAX INFORMATION RELEASE NO. 2019-03

RE: Guidance Regarding Marketplace Facilitators, Act 2, Session Laws of Hawaii 2019

The purpose of this Tax Information Release (TIR) is to provide guidance on the expanded imposition of general excise tax (GET) on sales made through marketplace facilitators under Act 2, Session Laws of Hawaii 2019 (Act 2).

Background

Act 2 will become effective on January 1, 2020. Act 2 deems “marketplace facilitators” to be the retail level sellers of tangible personal property, intangible personal property, and services sold through its marketplace. Act 2 also deems sales of tangible personal property, intangible personal property, and services by sellers to the “marketplace facilitator” to be sales at wholesale.

A “marketplace seller,” as used in this TIR, is any seller that makes sales through either a physical or electronic marketplace operated by a “marketplace facilitator,” whether or not the seller has a physical presence in the State.

Marketplace Facilitators Affected

Act 2 defines “marketplace facilitator” as any person who sells or assists in the sale of tangible personal property, intangible personal property, or services on behalf of another by providing a forum for the listing or advertisement of the item and by collecting payment from the purchaser, either directly or indirectly. “Marketplace facilitator” means a website, application, or platform of any type and includes, but is not limited to, the following business models:

- Educational service websites or applications, such as those that host third-party educational content and connect customers to that content;
- Food delivery service marketplaces, such as those that offer delivery of food to customers;
- Transportation network companies, such as those that connect customers to providers of motor vehicle transportation¹;
- In-person service and task-based service platforms, such as those that connect customers to service providers able to perform tasks or services for those customers;

¹ Please note that Act 2 codifies the Department’s position, as provided in TIR No. 2018-01, that transportation network companies are responsible for the GET at the retail rate on gross proceeds from all provided rides.

- Remote service marketplaces, such as those that connect customers with service providers that provide computer programming services or other services that can be provided remotely;
- Remote intangible property or data access marketplaces, such as those that provide customers access to third-party data stores, other intangible property, or computing power;
- Brick and mortar marketplaces of any type, including those listed above; and
- Travel agents and tour packagers that have engaged in activities relating to the furnishing of tourism related services, as defined under section 237-18(f), HRS, that go beyond merely arranging for the furnishing of the service.

As of the date of this TIR, the Department interprets Act 2 to exclude the following taxpayers:

- A travel agent or tour packager who arranges for the furnishing of transient accommodations; and
- A travel agent or tour packager who merely arranges for the furnishing of tourism related services as defined in section 237-18(f), Hawaii Revised Statutes (HRS).

The determination of whether a travel agent or tour packager merely arranges for the furnishing of tourism related services depends on the extent to which the taxpayer is involved in the furnishing of the tourism related service itself. The following are examples of activities which indicate involvement in the furnishing of tourism related services:

- Ensuring that the tourism related services are provided or that customers are refunded if the tourism related service provider fails to provide the service;
- Accepting any responsibility for the quality of the tourism related services;
- Enforcing uniformity standards on the tourism related service providers, such as cleanliness or comfort standards, communication standards, or health and safety standards in excess of those required by law;
- Controlling the amount and type of charges the tourism related service providers may charge for ancillary items, such as prohibiting tips or prohibiting payment other than through the marketplace's platform;
- Limiting the payment methods that the tourism related service provider may accept; such as prohibiting cash payments;
- Providing comprehensive, liability, or any other type of insurance coverage for the furnishing of the tourism related service, to the customer, or for the property used in the furnishing of the tourism related service;
- Imposing exclusivity terms on the tourism related service providers that are selling through them, such as prohibiting service providers from listing its services on any other platform;
- Hosting direct communications between the customer and the tourism related service provider; and
- Directing customers to communicate with tourism related service providers only through the marketplace's communication channel.

Taxpayers may contact the Rules Office by email at Tax.Rules.Office@hawaii.gov for assistance in determining whether they are deemed to be a marketplace facilitator under Act 2.

Engaged in Business in the State and Registration

If they have not already done so, all marketplace facilitators and marketplace sellers engaged in business in the State must register for GET licenses prior January 1, 2020, or prior to starting business activities, whichever is later.²

Any marketplace facilitator or marketplace seller with physical presence in the State is engaged in business in the State and is required to register for a GET license. Marketplace facilitators and marketplace sellers that do not have a physical presence are deemed engaged in business in the State if the economic thresholds established by Act 41, Session Laws of Hawaii 2018 (Act 41) are met.³

Act 41 applies to all taxpayers without a physical presence in the State, including marketplace facilitators and marketplace sellers, and deems a taxpayer that has no physical presence in the State to be engaged in business in the State if the taxpayer has gross income sourced⁴ to the State of \$100,000 or more or has 200 or more transactions with parties in the State.

Marketplace facilitators must combine their own sales made into the State with their marketplace sales made into the State to determine whether the Act 41 thresholds have been met.

Assuming the marketplace facilitator through whom the marketplace seller is making sales is engaged in business in the State, marketplace sellers must combine the following to determine whether the Act 41 thresholds have been met:

- Sales of tangible personal property made directly into the State (not through a marketplace facilitator);
- Sales of tangible personal property made through any marketplace facilitator if the marketplace seller sends the property into the State, either directly to the purchaser or to a marketplace facilitator for resale; and
- Sales of intangible property and services that were made into the State, regardless of whether the sale was made through a marketplace facilitator, if the intangible property or services are ultimately used or consumed in the State.

However, if the marketplace facilitator through whom the marketplace seller is making sales is not engaged in business in the State, the standard "engaged in business in the State" analysis, as if Act 2 were not enacted, will apply. Under this analysis, a marketplace seller is engaged in business in the State and subject to GET, if it has a physical presence in the State or meets the Act 41 thresholds based on all sales made into the State.

² §237-9(a), HRS.

³ See Tax Announcement No. 2018-10 for more information on Act 41.

⁴ See §§237-29.5, 237-29.53, and 237-29.57, HRS.

If neither the marketplace facilitator nor the marketplace seller is engaged in business in the State, the purchaser is liable for use tax on the purchase. These marketplace facilitators and marketplace sellers may still register to collect use tax.⁵

GET and Use Tax Liability for Marketplace Facilitators and Sellers

Act 2 deems marketplace facilitators to be the retail sellers of all products and services sold through their marketplaces. The GET rate for these sales is 4% plus any applicable county surcharge.⁶

Act 2 further deems the sales of marketplace sellers made through marketplace facilitators to be sales at wholesale under section 237-4, HRS, which defines wholesale sales. However, for the wholesale rate (0.5%) to apply, a specific law must allow for such an imposition. Section 237-13, HRS, contains the GET imposition laws. Specifically, section 237-13(2) and (6), HRS, provide for the imposition of the wholesale rate on the sale of tangible personal property and services, respectively. Section 237-13(9), HRS, imposes GET on the sale of intangible property and does not contain a provision that allows for the imposition at the wholesale rate. Thus, the wholesale rate is not available for sales of intangible property regardless of whether it is sold through a marketplace facilitator.

GET & Use Tax Liability of Marketplace Facilitators

Marketplace facilitators that are engaged in business in the State are subject to GET at the retail rate for:

- The marketplace facilitator's own sales made into the State; and
- Sales made through its marketplace into the State, regardless of whether the marketplace seller is registered to do business in the State.

Marketplace facilitators are also subject to use tax at the wholesale rate for:

- Sales of tangible personal property through the marketplace where the marketplace seller is not engaged in business in the State; and
- Sales of tangible personal property that is delivered to the marketplace facilitator outside of the State prior to the sale through the marketplace.

GET Liability of Marketplace Sellers

Marketplace sellers that are engaged in business in the State are subject to GET at the retail rate for:

- The marketplace seller's own retail sales made into the State.

⁵ For more information on the use tax and voluntary registration for seller's collection, see the Department's information brochure here: http://files.hawaii.gov/tax/legal/brochures/use_brochure.pdf

⁶ For more information, see the Department's county surcharge webpage here: <http://tax.hawaii.gov/geninfo/countysurcharge/>

Marketplace sellers that are engaged in business in the State are also subject to GET at the wholesale rate for:

- Sales of tangible personal property made through a marketplace facilitator that the marketplace seller sends to a retail purchaser in the State;
- Sales of tangible personal property that is delivered to a marketplace facilitator in the State prior to the retail sale; and
- Sales of services that are sold through a marketplace facilitator that are ultimately used and consumed in the State.

Notice and Reporting Requirements for those that are Not Marketplace Facilitators

Act 2 also requires any person who provides a forum, whether physical or electronic, for sellers to list or advertise products but who does not collect payment from the purchaser, either directly or indirectly, has two options, such a person must either:

- (1) Comply with Act 2's notice and reporting requirements; or
- (2) Elect to be deemed a marketplace facilitator.

These requirements will also apply to any marketplace facilitators that have requested and have been granted an exemption from Act 2 under the provisions of this TIR.

For more information, please contact the Rules Office at (808) 587-1530 or by e-mail at Tax.Rules.Office@hawaii.gov.

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